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NO. 91-948

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

CHURCH OF THE LUKUMI BABALU AYE, INC.
and ERNESTO PICHARDO,

Petitioners,

v.

CITY OF HIALEAH, FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

GREENBERG, TRAURIG, HOFFMAN,
LIPOFF, ROSEN & QUENTEL, P.A.
Richard G. Garrett, Esq.
Stuart H. Singer, Esq.
Attorneys for Respondent
1221 Brickell Avenue
Miami, Florida 33131
(305) 579-0500

QUESTION PRESENTED FOR REVIEW

(1) Whether the Free Exercise Clause of the First Amendment prohibits the City of Hialeah, Florida, from enacting ordinances which regulate the possession and killing of animals, including for ritual or sacrifice?

LIST OF PARTIES

The caption of the case in this Court contains the names of all the parties. The parties to the proceedings below and before this Court are Petitioners, The Church of the Lukumi Babalu Aye, Inc. and Ernesto Pichardo, and Respondent, City of Hialeah, Florida.

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Respondent, City of Hialeah, Florida, respectfully prays that this Court deny the Petition for a Writ of Certiorari seeking review of the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit which was entered on June 11, 1991. The opinion was not reported, but is contained at Appendix A1-2 (hereinafter "App.") to Petitioners' Petition for Writ of Certiorari.

STATEMENT OF THE CASE AND FACTS

This litigation concerns the constitutionality of four ordinances adopted by the City of Hialeah, Florida in the summer of 1987 on the subject of possessing, slaughtering and sacrificing of animals within the City limits. Petitioners, the Church of the Lukumi Babalu Aye, Inc. and Ernesto Pichardo, one of the priests of the Church, brought this action in September 1987 for a declaratory judgment, injunctive relief and damages against the City of Hialeah, the City Council and Mayor.

The District Court, Southern District of Florida (Spellman, J.), without a jury, conducted a seven day trial in July and August, 1989 on the issue of whether the City ordinances were unconstitutional under the First Amendment.[1/] On October 5, 1989, the District Court rendered its fifty (50) page decision affirming the constitutionality of the City ordinances in all respects. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 723 F. Supp. 1467 (S.D. Fla. 1989), App. A3.

The District Court expressly found that the intent of the City in enacting the ordinances was "to stop animal

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1/ There were two other aspects to the District Court case. The first, claims against the Mayor and City Councilmen in their individual capacity, was concluded by a Summary Judgment in Defendants' favor entered on June 10, 1988. A second aspect of the case concerned claims that the City, in violation of 42 U.S.C. 1983, harassed and discriminated against the Church with respect to building permits and a variety of municipal services. After trial, the District Court rejected these claims in their entirety, finding that "Plaintiffs have completely failed to prove any acts of discrimination or harassment in violation of Plaintiffs' rights to freely practice their religion." *City of Hialeah*, 723 F. Supp. at 1488, App. A3. Plaintiffs did not appeal either of these rulings.

sacrifice whatever individual, religion or cult it was practiced by," 723 F. Supp. at 1479, App. A23, not "to interfere with religious beliefs." 723 F. Supp. at 1476, App. A23. The District Court determined that the ordinances were enacted to bar the "indiscriminate slaughter in areas of the City not zoned for such activities because of the attendant risk to both public health and animal welfare." 723 F. Supp. at 1488, App. A49. The District Court held, therefore, that the ordinances "have at most an effect on Plaintiffs' religious conduct that is incidental to the ordinances' secular purpose and effect." 723 F. Supp. at 1484, App. A48. Because the District Court rendered its decision before the decision of this Court in *Employment Div., Dept. of Human Resources v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L.Ed.2d 876 (1990), it also found that the ordinances regulated conduct rather than belief, had both a secular purpose and effect, and were justified by compelling governmental interests which outweighed any incidental effect upon Plaintiffs' religious practices. 723 F. Supp. at 1483-87, App. A36-47.

The United States Court of Appeals for the Eleventh Circuit, without dissent, entered a *per curiam* affirmance of the District Court judgment on June 11, 1991. On appeal, Plaintiffs argued that the District Court erred under standards decided in *Smith*. App. A2. The Eleventh Circuit noted that the District Court made extensive findings of fact, *see City of Hialeah*, 723 F. Supp. at 1469-1479, App. A4-28, which were not contested by Petitioners. The Eleventh Circuit held that the District Court properly concluded that the ordinances passed by the City were not prohibited by the First Amendment because the ordinances are directed at conduct and not belief, had a secular purpose and effect, and the governmental interests in safeguarding the health, welfare and safety of the community and preventing cruelty to animals outweighed any effect upon Petitioners' religious

activity. App. A2.[2/] Noting that the District Court used an "arguably stricter standard" in determining whether the ordinances violated the United States Constitution than this Court did in *Smith*, 110 S. Ct. 1595 (1990), the Eleventh Circuit determined it unnecessary to decide the effect of *Smith* on this case.

The question in this case is whether a municipality may, consistent with the First Amendment and *Smith*, prevent tens of thousands of chickens, goats, ducks, and other animals from being uncleanly held, inhumanely killed, and unsafely discarded throughout the homes and streets of an urban community. The question is not whether Santeria is a religion, whether animal sacrifice is a central part of at least certain Santeria practices, nor whether the ordinances could apply only to practices that occurred in the Santeria church.

Santeria is a religion which is practiced in South Florida today by approximately 50,000 to 60,000 practitioners. 723 F. Supp. at 1470, App. A6. An unspecified number of these practitioners practice animal sacrifice. *Id.* Most of the alleged religious activity takes place in the individual homes of family groups and there is no intermingling between these groups. *Id.* In fact, few practitioners of Santeria know other practitioners outside their own group. *Id.* Petitioners' beliefs are based on the interpretation of an oral tradition and there is no organized

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2/ Because it affirmed these reasons, the Eleventh Circuit did not address the District Court's reasoning contained in Part C(2) of its "Conclusions of Law" that the City's compelling governmental interest to prevent possible adverse psychological effects on children outweighed any incidental effect upon the Santeria religion. App. A2 n1.

worship, centralized authority, written code or tradition. *Id.* at 1471 n. 9, App. A8.

The sacrifice of animals, including chickens, pigeons, doves, ducks, guinea fowl, goats, sheep, and turtles, are sacrificed as part of the rituals and ceremonies conducted by practitioners of Santeria. 723 F. Supp. at 1471, App. A9. A single initiation rite, for example, would involve sacrifice of between 20 and 30 animals. 723 F. Supp. at 1473, n. 22, App. A15, n. 22. As the District Court observed, in South Florida "that means that between 12,000 and 18,000 animals are sacrificed in initiation rites alone, during a one year period." 723 F. Supp. at 1473, n. 22, App. A15, n. 22. Most of the animals which are sacrificed are consumed as food after the sacrifice. *Id.*

Most of the animals which are sacrificed are bought either from botanicas or from local farms that breed the animals specifically for sacrifice. 723 F. Supp. at 1474, App. A17. These animals are kept in extremely overcrowded and filthy conditions. 723 F. Supp. at 1474, App. A17. In botanicas, the animals are often not fed and watered in light of their sale for immediate sacrifice. 723 F. Supp. at 1474, App. A17. Not surprisingly, the District Court expressly found that the animals suffer intensely under these conditions. 723 F. Supp. at 1474, App. A17.

Petitioners generally sacrifice an animal by puncturing the animal's neck with a knife in the hope that it will sever both of the main arteries of the animal. 723 F. Supp. at 1472, App. A12. This method of sacrificing animals is unreliable, inhumane, 723 F. Supp. at 1472-73, App. A12-13, and "in fact causes great fear and pain to the animal." 723 F. Supp. at 1473, App. A15.

Unfortunately, animal cruelty is but one dimension of the problem. The remains of the sacrificed animals create a health hazard because the remains attract flies, rats and other animals which serve as vectors of serious disease. 723 F. Supp. at 1474-75, App. A18-19. The animal's blood is drained into pots and left for an indeterminate time, even months or years. 723 F. Supp. at 1473, App. A14-15; R-9-278; R-10-379-80. Although most of the animals are consumed, some animals used in healing rites are not. 723 F. Supp. at 1471, n. 11, App. A9, n. 11. Moreover, the viscera of animals eaten must still be disposed somehow and animal remains, along with items reflecting sacrifice, were found in public places, 723 F. Supp. at 1474, App. A18, including intersections, backyards, railroad tracks, homes, rivers, and by the sides of roads. R-10-377-378. Animal carcasses have been found near rivers or canals, by stop-signs, under palm trees, behind the Dade County Courthouse, and on people's lawns or doorsteps. 723 F. Supp. at 1474, n. 29, App. A18, n. 29; R-14-1200; R-12-765; R-10-377. Petitioners admitted that they would be unable to monitor or control the way individual practitioners disposed of the sacrificed animals. 723 F. Supp. at 1471, App. A10.

Uncontradicted evidence established that rats, flies and other animals attracted to the remains may themselves carry and exchange diseases, increasing the risk of spread of disease to humans. 723 F. Supp. at 1474-75, App. A16-18. Areas where sacrificed animals are left can become a harborage for rats and fleas and the spread of disease to other animals and to humans is much more likely. 723 F. Supp. at 1475, App. A18-19. The potential diseases include dysentery, typhoid, cholera, salmonella, salmonosis, infectious hepatitis, yaws, trachoma, plague and many of the parasitic worms. 723 F. Supp. 1475, n. 33, App. A19, n. 33. The District Court found that the increased risk of disease and infestation and threat to the public health and welfare

caused by indiscriminate animal slaughter was a compelling governmental interest. 723 F. Supp. at 1485-1486, App. A41-44.

The City of Hialeah sought to combat the problems created by animal sacrifice by a series of four ordinances. On June 9, 1987, the City adopted an emergency ordinance (No. 87-40) which simply adopted the language of Florida's state anti-cruelty statute. On September 8, 1987, a second ordinance (No. 87-52) was adopted prohibiting the possession of animals intended for sacrifice or slaughter, except where zoned. Two further ordinances were adopted on September 22, 1987. No. 87-72 prohibited the slaughtering of animals on premises not properly zoned for that purpose, while No. 87-71 authorized registered groups to investigate animal cruelty complaints.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE ELEVENTH CIRCUIT DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *SMITH*.

Petitioners do not request certiorari jurisdiction on any ground other than an alleged conflict between the decision of the United States Court of Appeals for the Eleventh Circuit and decision of this Court in *Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L.Ed.2d 876 (1990). The Court in *Smith* held that the free exercise clause did not prohibit application of Oregon drug laws to ceremonial ingestion of peyote. It held that a valid and neutral law of general applicability need not be justified by a compelling interest, even if it places a burden on a religious practice. *Id*., at 1599-1602. The Court also ruled that no balancing test is

required to deny an exemption to such a law for religiously motivated conduct. *Id*. at 1603-06.

Contrary to Petitioners' argument, *Smith* fully supports the decision in this case and did not expand their rights under the First Amendment. *Smith* held that a "neutral, generally applicable regulatory law may be applied constitutionally to religiously-motivated conduct without compelling justification." *Id*., at 1601. The District Court expressly found that the challenged ordinances "were not passed to interfere with religious beliefs," but, instead, were intended to "stop the practice of animal sacrifice in the City . . . whatever individual, religion or cult it was practiced by." 723 F. Supp. at 1479, App. A28. The District Court stated that ordinances "have at most an effect on Plaintiffs' religious conduct that is incidental to the ordinances' secular purpose and effect." 723 F. Supp. at 1484, App. A40. Because any burden on Petitioners' religious conduct generally is an incidental effect of a generally applicable and otherwise valid provision prohibiting animal sacrifice, the decision below does not conflict with *Smith*.

Petitioners ignore the express District Court findings and seize upon and misconstrue one passage in its fifty page opinion as a finding that the ordinances are not religiously neutral. The passage reads in its entirety: "Although the ordinances are not religiously neutral but were intended to stop the practice of animal sacrifice in the City of Hialeah, the ordinances were not passed to interfere with religious beliefs, but rather to regulate conduct." 723 F. Supp. at 1476-77, App. A23. In context, it is clear that the District Court was referring to religious neutrality in the same sense as Justice O'Connor in *Wallace v. Jaffree*, 472 U.S. 38, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985) (concurring). *See* 723 F. Supp. at 1484 (*citing Wallace*), App. A40 (*citing Wallace*). The District Court uses religious neutrality to refer to the

fact that government action often benefits or burdens religious exercise, and thus is not strictly neutral toward religion. Thus, the District Court did not find that the ordinances are intended to discriminate against Santeria or, for that matter, against religion, a position that it clearly and emphatically rejected. *See* 723 F. Supp. at 1484, App. 40-41

Nevertheless, Petitioners claim that the ordinances discriminate on their face against religion because their references to "sacrifice" and "ritual" can only refer to religious conduct. A facial challenge to a statute on free exercise grounds, like any facial challenge, must establish that it is unconstitutional "in every conceivable application" or seeks to prohibit a broad range of protected conduct. *See Members of the City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 796, 104 S.Ct. 2118, 2125, 80 L.Ed.2d 772 (1984). Contrary to Petitioners' argument, however, the ordinances prohibit possessing, sacrificing or slaughtering animals by any person for any reason, except in slaughterhouses, 723 F. Supp. at 1484, App. A40, which certainly is not unconstitutional. Moreover, the District Court found that the subject ordinances applied to a wide range of conduct other than Petitioners' sacrifices, such as sacrifices by satanic cults, voodoo and cockfighting, which are not protected conduct.[3/] 723 F. Supp. at 1484, n. 53, App. A41, n. 53. Accordingly, Petitioners cannot persuasively argue that the ordinances, simply by referring to sacrifice or ritual, inherently define

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3/ Petitioners conceded in their Brief before the Eleventh Circuit that "sacrifices" are performed by individuals who are not members of groups that are protected "religions" under the First Amendment, such as voodoo. *See Brief of Appellants, at 9 ("nor should santeria be confused with voodoo, a Haitian phenomena so changed from its roots that "it is not, strictly speaking, an African religion any longer.").*

and apply solely to religious conduct. *See Jones v. Butz*, 374 F. Supp. 1284, 1292-93 (S.D.N.Y.), *aff'd*, 419 U.S. 806 (1974) (upholding the ritual slaughter exception in Federal Humane Slaughter Act and noting that "ritual" is not synonymous with "religious").

Noting that both the State of Florida and City authorize the killing of animals (in slaughterhouses) for food, allow the selling of meat, permit hunting, fishing and trapping, sanction the extermination of rodents and lawfully administered euthanasia in animal subshelters, Petitioners illogically conclude that the City also must classify religion as an acceptable reason and permit animal sacrifices. However, the Court in *Smith* expressly held that a neutral law of general applicability could place an incidental burden on a religious practice. *Id., at 1599-1602.* Moreover, even if the hunting of wild animals, extermination of rodents or euthanasia resulted in the health hazards and cruelty posed by animal sacrifice, the City constitutionally does not have to redress all such problems at the same time. See *United States v. Lee*, 455 U.S. 252, 259, 102 S.Ct. 1051, 1058, 71 L.Ed.2d 127 (1982); *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608, 610, 55 S.Ct. 570, 572, 79 L.Ed. 1086 (1935). Contrary to Petitioners' argument, the City does not have to prohibit all killing of animals under any circumstances to constitutionally prohibit animal sacrifice.

Petitioners also argue that the Eleventh Circuit's decision violates *Smith* because the ordinances' effect on Petitioners' religion is paramount. However, nowhere does *Smith* suggest that an otherwise neutral, generally applicable regulatory law is subject to greater scrutiny because of the degree of interference with religious conduct or the centrality of the religious practice. To the contrary, the Court directly rejected Petitioners' herein argument by stating: "The government's ability to enforce generally applicable

prohibitions of socially harmful conduct . . . cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development . . . Nor is it possible to . . . requir[e] a 'compelling state interest' only when the conduct prohibited is 'central' to the individual's religion." 110 S. Ct. at 1603-04 (citations omitted).

Petitioners further blatantly misrepresent the holding in *Smith* and argue that a compelling interest must be shown to deny an exception for conduct motivated by religious belief. However, the Court in *Smith* specifically rejected the identical argument in distinguishing *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) and its progeny of unemployment compensation decisions. The Court emphasized that it never had invalidated any governmental action under the *Sherbert* balancing test outside the unemployment compensation area. Indeed, the Court noted that in recent decisions it had declined to apply *Sherbert* outside the unemployment compensation field. Noting that *Sherbert* was developed in a context that lent itself to "individualized governmental assessment of the reasons for the relevant conduct", the Court concluded that the balancing test is simply inapplicable to challenges to generally applicable criminal laws. 110 S. Ct. at 1603.

Finally, Petitioners argue that the decision below conflicts with this Court's interpretation of the compelling interest test in *Smith* and prior cases. Although the District Court rendered its decision before *Smith* and applied the stricter framework of *Grosz v. City of Miami Beach*, 721 F.2d. 729 (11th Cir. 1983), *cert. denied*, 469 U.S. 827 (1984) to require both "compelling governmental interests" and a balancing approach if a law incidentally burdens religious conduct, under *Smith* it is not necessary to balance the burden imposed by a generally applicable, neutral ordinance on religious practice against the compelling state interest promoted by the ordinance. 110 S. Ct. at 1602-05. Indeed, the Court rejected a presumption of invalidity as applied to

the religious objector of every regulation of conduct that did not protect an "interest of the highest order." *Id.* at 1605. The Court then specifically cited the District Court opinion below as an example of an interest which could be protected without violating the First Amendment's protection of religious liberty. *Id.*, at 1605.[4/] Accordingly, the lower court decision does not conflict with *Smith* -- it applied a stricter standard than *Smith*.

II. THE DECISION OF THE ELEVENTH CIRCUIT DOES NOT CONFLICT WITH ANY DECISIONS OF THE FEDERAL COURTS OF APPEAL OR STATE SUPREME COURTS.

Petitioners do not seek certiorari jurisdiction on any grounds other than an alleged conflict with *Smith*. The Eleventh Circuit decision does not conflict with a decision of another United States Court of Appeals in the same matter

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4/ The District Court findings certainly establish compelling governmental interests if *Smith* required such findings. First, that the City has a compelling interest in controlling disease is beyond dispute. *See, e.g., Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 166-67, 64 S.Ct. 438, 88 L.Ed. 645 (1944); *Johansson v. Board of Animal Health*, 601 F. Supp. 1018 (D. Minn. 1985). The City also has a compelling interest protecting animals from the cruelty of animal sacrifice. *See Humane Society of Rochester and Monroe County For Prevention of Cruelty to Animals, Inc. v. Lyng*, 633 F. Supp. 480, 486 (W.D.N.Y. 1986); *Animal Legal Defense Fund Boston, Inc. v. Provimi Veal Corp.*, 626 F. Supp. 278, 280 (D. Mass. 1986), *aff'd*, 802 F.2d 440 (1st Cir. 1986), *aff'd*, 802 F.2d 440 (1st Cir. 1986). Finally, the City has a compelling interest in prohibiting the slaughter or sacrifice of animals within areas of the City not zoned for slaughterhouse use. *In re Slaughter-House Cases*, 16 Wall. 36, 83 U.S. 36, 21 L.Ed. 394 (U.S. 1872).

or with a state court of last resort. In fact, a review of federal and state law indicates that the Eleventh Circuit's decision is the only reported decision involving whether animal sacrifice can be regulated consistent with the protections afforded by the First Amendment. Accordingly, the lower court decision is wholly consistent with *Smith*, its progeny, *see, e.g. Vandiver v. Hardin County Bd. of Educ.*, 925 F.2d 927, 931-34 (6th Cir. 1991); *Rector, Wardens and Members of Vestry of St. Bartholomew's Church v. City of New York*, 914 F.2d 348, 353-56 (2d Cir. 1990), *cert. denied*, __ U.S. __, 111 S.Ct. 1103, 113 L.Ed.2d 214 (1991); *Yang v. Sturner*, 750 F. Supp. 558, 559-60 (D.R.I. 1990), and the free exercise cases which preceded *Smith*. *See, e.g., United States v. Lee*, 455 U.S. 252, 263, n.3, 102 S.Ct. 1051, 1058, n.3, 71 L.Ed.2d 127 (1982).

CONCLUSION

For the foregoing reasons, the Court should deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

GREENBERG, TRAURIG,
HOFFMAN, LIPOFF, ROSEN
& QUENTEL, P.A.
Richard G. Garrett, Esq.
Stuart H. Singer, Esq.
Attorneys for Respondent
1221 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 579-0500

By: Richard G. Garrett
RICHARD G. GARRETT
STUART H. SINGER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and forty (40) copies of the foregoing Respondent's Brief in Opposition were sent by United States Mail, First Class Postage prepaid, to the CLERK OF THIS COURT, and a copy of the foregoing was sent by United States Mail, First Class Postage Prepaid, to the following counsel of record: DOUGLAS LAYCOCK, ESQ., 727 East 26th Street, Austin, Texas 78705, and one copy was sent by U.S. Mail to each of the following counsel: JEANNE BAKER, ESQ., American Civil Liberties Union Foundation of Florida, 225 N.E. 34th Street, Miami, Florida 33137; JORGE A. DUARTE, ESQ., 2503 SW 27th Avenue, Miami, Florida 33133; and MITCHELL HORWICH, ESQ., Horwich & Zager, P.A., 1541 Sunset Drive, Coral Gables, Florida 33143, this 14th day of February, 1992.

Richard G. Garrett
RICHARD G. GARRETT